Abang Zailan bin Abang Zainal v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO KG 11 OF 1991
CHONG SIEW FAI J
22 OCTOBER 1991

Criminal Procedure *— Sentence — When other charge may be taken into consideration — Effect of taking other charges into consideration — Discretion of court — Criminal Procedure Code (FMS Cap 6) s 171A*

The appellant pleaded guilty to six charges of cheating. However the record showed that three of the six charges were also 'withdrawn' and 'taken into consideration'. The appellant was sentenced to a total of three years' imprisonment and fined a total of $3,000 on three charges. The record showed that he was given an acquittal in respect of the other three charges. The appellant appealed against the sentences.

Held, allowing the appeal:

(1) The appellant must consent to charges being taken into consideration. The record did not show that the appellant had consented to three of the charges being taken into consideration.

(2) The trial court had a wide discretion whether or not to take any offence into consideration. There was nothing on the record to show that the court had exercised its discretion. Neither did the record show that the trial magistrate had in fact taken the charges into consideration.

(3) When offences were taken into consideration, the offender would not be liable to be charged or tried in respect of the same.

[Bahasa Malaysia summary

Perayu mengaku salah atas enam tuduhan menipu. Walau bagaimanapun rekod menunjukkan bahawa tiga daripada enam tuduhan itu telah juga ditarik balik dan diambil dalam pertimbangan. Perayu telah dihukum penjara selama tiga tahun dan didenda sebanyak $3,000 atas tiga tuduhan. Rekod menunjukkan bahawa dia telah dibebaskan berkenaan dengan tiga tuduhan yang lain. Perayu telah merayu terhadap hukuman-hukuman tersebut.

Diputuskan, membenarkan rayuan itu:

(1) Perayu mesti bersetuju supaya tuduhan diambil dalam pertimbangan. Rekod tidak menunjukkan yang perayu telah bersetuju supaya tiga daripada tuduhan-tuduhan itu diambil dalam pertimbangan.

(2) Mahkamah perbicaraan mempunyai budi bicara yang luas sama ada atau tidak untuk mengambil sebarang kesalahan dalam pertimbangan. Tiada apa-apa pun dalam rekod yang menunjukkan

bahawa mahkamah telah menjalankan budi bicaranya. Rekod juga tidak menunjukkan yang majistret perbicaraan telah pada hakikatnya mengambil tuduhan-tuduhan itu dalam pertimbangan.

(3) Apabila kesalahan-kesalahan diambil dalam pertimbangan, pesalah tidak boleh didakwa atau diperbicarakan berkenaan dengan kesalahan yang sama.]

Cases referred to

1 *DPP v Anderson* (1978) 67 Cr App R 185 (folld)
2 *R v Bell* (1922) 16 Cr App R 56 (folld)
3 *R v Smith* (1921) 15 Cr App R 172 (folld)
4 *R v Nicholson* (1947) 32 Cr App R 127 (folld)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 171A

Appellant in person.
Thomas Akin (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Chong Siew Fai J: The notes of proceedings in this appeal show that originally six charges of cheating were preferred against the appellant, each under one case. The six cases are: (a) M/CR/523/90A, (b) M/CR/496/90/A, (c) M/CR/521/90/B, (d) M/CR/522/90/C, (e) M/CR/586/90/C, and (f) M/CR/568/90/C.

They were heard on the same day, ie 28 February 1991.

The appellant pleaded guilty to each of the six charges. The facts of each case were read and explained to him. He admitted them all to be correct.

What happened next, according to the record, was that the police prosecuting officer, purportedly acting under s 171A of the Criminal Procedure Code (FMS Cap 6) ('CPC'), applied to 'withdraw' the three charges in cases (d), (e) and (f) and 'to take into consideration of the other charge', whatever that may mean. There was then a brief plea of mitigation by the appellant followed by acceptance of the pleas of guilty by the learned trial magistrate who after giving his reasons sentenced the appellant as follows: (1) under case (a) above: three years' imprisonment and a fine of $1,000 in default two months' imprisonment; (2) under case (b) above: two years' imprisonment and a fine of $1,000 in default three months imprisonment; and (3) under case (c) above: one year's imprisonment and a fine of $1,000 in default three months' imprisonment.

The sentences were ordered to run concurrently with effect from 28 February 1991. The learned trial magistrate finally ordered: 'The remaining charge be acquitted and discharged', which in the context meant the acquittal and discharge of cases (d), (e) and (f).

Against the sentences the appellant now appeals, contending that 'sentence imposed was manifestly excessive'.

The notes of proceedings of the lower court reveal several irregularities. Most of them relate to the taking of other outstanding offences into consideration for the purpose of sentencing. In our country Malaysia, the law and procedure now in force of enabling outstanding offences to be taken into consideration for sentencing purposes was introduced in 1967 by s 12 of the Criminal Procedure Code (Amendment) Act 1967 which came into effect on 1 June 1967 vide PU 205/1967. It takes the form of s 171A of the CPC. There is, however, little local case law on the subject. A cursory look at the English position may be enlightening. In England, the procedure or practice originated from convention in the late 19th century. Since then it has developed through decided cases and gained recognition of the courts. The practice was approved by the House of Lords in *DPP v Anderson*[1] and is now well established.

I shall now deal with the irregularities:

(1) There is no conviction respecting each of the three charges in cases (a), (b) and (c) to which the appellant had pleaded guilty.

(2) There is, on record, no consent of the accused to the offences in cases (d), (e) and (f) being taken into consideration for the purpose of sentencing: s 171A(i) of the CPC; *DPP v Anderson*;[1] *R v Bell.*[2]

(3) There is nothing in the notes of proceedings showing whether the learned trial magistrate had exercised his discretion to allow or refuse the application to take the three offences into consideration: s 171A(i) uses the word 'may'. In *R v Smith*,[3] Darling J, in explaining the duty of the presiding judge, said:

> A judge is not bound, in passing sentence, to take into account other charges pending against a prisoner. In *Syres* 73 JP 13; 25 TLR 71; 1 Cr App R 172: 1908, it was decided that a judge may, in passing sentence, take into account other charges which a prisoner admits.

The same duty applies to a presiding magistrate. The trial court, therefore, has a wide discretion whether or not to take any offence into consideration and is entitled in appropriate cases to consider whether the public interest requires separate investigation and prosecution. But decide it must. It is to be remembered that taking an offence into consideration does not in law constitute a conviction.

(4) On the assumption that the learned trial magistrate had acceded to the application of the prosecution, the record does not show that the learned trial magistrate had in fact taken the three offences in cases (d), (e) and (f) into consideration in sentencing the appellant (see the judgment at p 4 of the notes of proceedings). This is important in view of the ensuing effect or consequences provided in s 171A(ii), particularly that if the offences had been taken into consideration, the offender would not be liable to be charged or tried in respect of the same. In this connection, the following observation of Humphreys J in *R v Nicholson*[4] expressing the rationale (at p 131) is enlightening:

> Where a list of outstanding offences has been taken into consideration by a Court, the reason why it is undesirable that the person convicted should be

tried again for any one of those offences is that there would be a danger of his being twice punished for the same offences, ...

(5) Whatever the situation, the learned trial magistrate ought not to have acquitted and discharged the appellant of the three offences in cases (d), (e) and (f) to which the appellant, as appearing from the record, had pleaded guilty and admitted the facts as correct.

In view of the unsatisfactory features I would have set aside the sentences imposed and the orders of acquittal and discharge respecting the offences in cases (d), (e) and (f), and would have ordered all the six cases to be remitted to the magistrate's court for retrial had it not been for the fact that it was disclosed during the hearing of this appeal that the appellant had not only completed serving the imprisonment sentences in default of payment of the fines (hereinafter referred to as 'the default imprisonment sentences') but had also continued to serve the principal imprisonment sentences imposed by the lower court despite the stay of the principal imprisonment sentences pending appeal having been granted by the lower court because the prison authorities had not been informed of the stay. There is also another unfortunate feature in that the registry of the lower court had erroneously notified the prison authorities that the default imprisonment sentence for M/CR/523/90/A was three months when in fact the court ordered only two months.

In view of the extenuating circumstances, and to compensate for the injustice done to the appellant, and also because it is rather undesirable to send the appellant back to the prison from where he had been released four days ago (on 18 October 1991), on account of the error through no fault of his, I decided to be lenient to him and consider it not unreasonable to do so. I would regard the custodial sentence hitherto served by the appellant over and above the default imprisonment sentences that he had undergone as sufficient punishment for the offences committed by the appellant in cases (a), (b) and (c) as well as in cases (d), (e) and (f) which are also taken into consideration. Public interest would also be served if the appellant would grasp this opportunity to turn to honest living which I hope he would. I wish, however, to make clear that the lenient course taken in this case was principally due to the unfortunate features mentioned above which do not appear to be fair to the appellant, particularly the continuation of imprisonment despite the stay ordered by the lower court and should not be regarded as a precedent in ordinary cases involving offences of this nature.

To rectify the errors and to avoid any misunderstanding, I would summarize my decisions as follows:

(1) the appellant is convicted of the offences in cases (a), (b) and (c) to which he had pleaded guilty;
(2) the principal imprisonment sentences imposed by the lower court in cases (a), (b) and (c) are set aside;
(3) the orders of acquittal and discharge respecting the offences in cases (d), (e) and (f) are set aside; and

A (4) the period of the appellant's detention in the prison in excess of the default imprisonment sentences he had served be treated as sufficient punishment for offences in cases (a), (b) and (c) as well as in cases (d), (e) and (f) which have been taken into consideration.

Appeal allowed.

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Reported by Mathavan Devadas

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